

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN MERCHANT MARINE INSURANCE COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

H. G. TREMAINE, S. L. BUCKLEY and JOHN DOE BUCKLEY, Doing Business Under the Firm Name and Style of BUCKLEY-TREMAINE LUMBER COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED

JUL 6 - 1920

F. D. MONGKTON,

CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

B. S. GROSSCUP, Esq., Solicitor for Plaintiff,
Perkins Building, Tacoma, Washington.
W. CARR MORROW, Esq., Solicitor for Plaintiff,
Perkins Building, Tacoma, Washington.
HAROLD M. SAWYER, Esq., Solicitor for Plaintiff,
Mills Building, San Francisco, California.
ALFRED T. CLUFF, Esq., Solicitor for Plaintiff,
Mills Building, San Francisco, California.
F. A. HUFFER, Esq., Solicitor for Defendant,
Henry Building, Seattle, Washington.
W. H. HAYDEN, Esq., Solicitor for Defendant,
Henry Building, Seattle, Washington. [1*]

No. 186-E.

Bill of Complaint.

Complainant complains and alleges:

I.

That the American Merchant Marine Insurance Company of New York is a corporation duly organized and existing under and by virtue of the laws of the State of New York and is a citizen of said State, and is authorized to do business as an insurance company in the State of Washington, and has fully complied with all the requirements of the laws of the State of Washington, and has paid its annual license fee last due.

*Page-number appearing at foot of page of original certified Transcript of Record.

II.

That the defendants, H. G. Tremaine and S. L. Buckley, are copartners doing business under the firm name and style of Buckley-Tremaine Lumber Company in the City of Seattle, in the State of Washington, and the defendant, H. G. Tremaine, is a citizen of the State of Washington.

III.

That on or about the third day of October, 1919, complainant insured for defendants, lumber on Scow F. L. B. No. 3 for October sailing, in tow of tug "Coutli" and/or other approved tug, at and from Craig, Alaska (in single tow), to Prince Rupert, B. C., thence (in double tow) to Seattle, Washington, in the sum of four thousand eight hundred seventy-five dollars (\$4,875.00), which said lumber was valued at \$17.50 per thousand feet; loss if any payable to the order of the assured in Seattle; copies of said insurance are hereto attached, marked Exhibits "A" and "B" and made a part of this complaint. [2]

IV.

That in the drafting and delivery of Exhibit "B" this complainant inadvertently and by mistake omitted to insert therein the sailing date or time within which said Scow F. L. B. No. 3 was required and warranted under said insurance to sail, and said defendants inadvertently and by mistake received, accepted, and ever since have retained and do now retain said Exhibit "B" so erroneously issued.

V.

That the sailing date set forth and agreed to in Exhibit "A" and inadvertently and by mistake

omitted from Exhibit "B" was a material warranty by defendants, materially and substantially affecting the rights and obligations of the parties thereto, and particularly the rights and obligations of this complainant.

VI.

That complainant has no plain, speedy and adequate remedy in a court of law, and complainant further alleges that in equity and justice Exhibit "B" hereto attached ought to be reformed and corrected by inserting therein the words "October sailing." That the controversy in this suit is between citizens of different States, to wit, between a citizen of the State of New York and citizens of the State of Washington, and is one which can be fully determined between them in a District Court of the United States. That the amount involved, exclusive of interest and costs, exceeds the sum of \$3,000.00.

WHEREFORE Complainant prays that said Exhibit "B" herein set forth be corrected and reformed by inserting therein the words "October sailing," and that complainant have such other and further relief as to the Court may seem just and equitable, and recover its costs herein expended.

B. S. GROSSCUP and
W. C. MORROW,
Attorneys for Complainant. [3]

Exhibit "A."

Seattle, Wash., Oct. 3d, 1919.

INSURANCE IS WANTED BY BUCKLEY-TREMAINE LUMBER COMPANY.

LOSS, IF ANY, payable to Them, or order.

FOR \$7,875. ON Lumber VALUED AT \$17.50 per M. Ft.

PER F. L. B. SCOW "No. 3" in single tow of Tug "COUTLI" at and from Craig, Alaska, to Prince Rupert, B. C., thence while in double tow of Approved Tug to Seattle, Wash. (Oct. Slg.)

This insurance is understood and agreed to be subject to English Law and usage to Liability for and settlement of any and all claims.

RATE—3%.

CONDITIONS—Insured only against the risk of Total and/or Constructive Total Loss but to pay any General Average and/or Salvage Charges that may be incurred.

ACCEPTED—PACIFIC MARINE INSURANCE CO.

\$4,875.00—AMERICAN MERCHANT MARINE INS. CO. OF N. Y.

(M. D. C.) [4]

Exhibit "B."

CERTIFICATE OF INSURANCE.

To conform with the Revenue Laws of Great Britain,
in order to collect a claim under this Certificate
it must be stamped within ten days after its re-
ceipt in the United Kingdom.

Special Cargo	Amount
11123-C	\$4,875.00
No. 11261-C	Rate 3%
	Prem. \$146.25

**AMERICAN MERCHANT MARINE
INSURANCE COMPANY OF NEW YORK,
SEELEY & CO., (MARINE) INC.,
Pacific Coast General Agents.**

140 Sansome Street.	Colman Bldg.
San Francisco, Cal.	Seattle, Wash.
Board of Trade Bldg.	Dominion Building
Portland, Ore.	Vancouver, B. C.

Seattle, Wash., October 6, 1919.

THIS IS TO CERTIFY, that on the Sixth day of
October, 1919, this Company insured for Buckley-
Tremaine Lumber Company Four thousand eight
hundred seventy-five dollars (\$4,875.00) Dollars on
Lumber, Valued at \$17.50 per 1,000 feet on board
Scow F. L. B. No. 3 in tow tug "COUTLI" and/or
other approved tug at and from Craig, Alaska, (in
single tow), to Prince Rupert, B. C., thence (in
double tow) to Seattle, Wash., loss, if any, payable
to the order of the assured in Seattle.

This insurance subject to conditions as stated be-
low and on back hereof.

[Stamped across face:] Original. Original and duplicate issued, one of which being accomplished, the other to stand null and void.

MARKS AND NUMBERS.

CONDITIONS.

This certificate is subject to the full terms of the policy, BUT warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, or the consequence of any attempt thereat, whether lawful or unlawful, or whether by the act of any belligerent nations or by governments of seceding or revolting States, or by unauthorized or lawless persons therein, or otherwise, and whether occurring in a port of distress or otherwise, anything in this policy to the contrary notwithstanding, and free from all other consequences of hostilities whether before or after declaration of war.

Held covered at a premium to be arranged, in case of deviation or change of voyage or of any error or unintentional omission in the description of the interest, vessel or voyage, provided same be communicated to the assurers as soon as known to the assured.

Held covered on board craft and/or lighter to and from the vessel. Each craft and/or lighter to be deemed a separate insurance.

IT IS AGREED THAT THERE SHALL BE NO RETURN OF PREMIUM IF INTEREST INSURED BE LOST BY PERILS NOT INSURED AGAINST HEREUNDER.

In Case of Loss Apply to SEELEY & CO, (Marine), Inc., at Seattle, Wash.

CONDITIONS.

Warranted not to cover the interest of any alien

enemies including such persons, copartnerships or corporations, as now, or may hereafter, appear in any Enemy Trading List issued by the War Trade Board of the United States of America.

ENGLISH POLICY.

Insured only against the risk of total and/or constructive total loss, but to pay any General Average and/or Salvage Charges that may be incurred.

MDC.

This insurance is understood and agreed to be subject to English law and usage to Liability for and settlement of any and all claims.

MDC.

IN WITNESS WHEREOF, the said Company has caused these Presents to be signed by its President in the City of New York, but this certificate shall not be valid unless countersigned by the Company's duly authorized representative.

I. STEWART,

President.

T. M. LEE MARTIN,

Secretary.

Countersigned at Seattle, Wash., the 6th day of October, 1919.

SEELEY & CO. (Marine) Inc.,

By M. D. CALDER. [5]

The adventures and perils which the said Assurers are contented to bear and take upon themselves in this voyage are *of the seas, fires, men of war, enemies, pirates, rovers, assailing thieves, jettison, letters of mart or countermart, takings at sea, arrests, restraints and detainments of all kings, princes and peo-*

ple, of what nation, condition or quality soever, criminal barratry of the master and mariners, and all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, and the assured's factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise or any part thereof, without prejudice to this insurance; nor shall the acts of the assured or assurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said assurers will contribute according to the rate and quantity of the sum herein insured.

In case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the merchandise hereby insured (the amount of premium if unpaid, being first deducted); Provided Always, and it is hereby further agreed, that if the assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this certificate, then the said Assurers shall be answerable only for so much as the amount of such prior assurance may be deficient toward fully covering the premises hereby assured, and the said Assurers shall return the premium upon so much of the sum by it assured as it shall be by such prior assurance exonerated from. And in case of any assurance upon the said premises, subsequent in date to this certificate, the said As-

surers shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premiums by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this certificate, shall be deemed simultaneous herewith, and these assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance.

The said merchandise is insured as under deck unless otherwise specified in this certificate. Only such merchandise as shall be stowed under the main deck shall be deemed stowed under deck. Cargo on deck free from claim for damage by wet, breakage, leakage or exposure, and liable only for absolute total loss or total loss of a part, if amounting to ten per cent.

Warranted by the assured, if loaded with grain, petroleum and heavy cargoes, to be loaded under the inspection of the surveyor appointed or approved by the Assurers for that purpose, and his certificate as to the proper loading and seaworthiness obtained.

Warranted not to abandon, in case of capture, seizure or detention, until after the condemnation of the property insured; nor until ninety days after notice of condemnation is given to the Assurers. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end

the voyage, when and where all the liability of the Assurers shall cease. It is Also Agreed that the property be warranted by the Assured free from any charge, damage or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war or the violation of any port regulation.

Warranted by the Assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water, with the articles damaged, occasioned by sea perils. Not liable for leakage on molasses or other liquids, nor for breakage of glass, crockery or other bottled wares, unless occasioned by stranding or collision with another vessel. In case of loss or damage to any part of a machine, consisting, when complete for sale or use of several parts, the Assurers shall only be liable for the insured value of the part lost or damaged.

It is Agreed that upon the payment of any loss or damage, the Assurers are to be subrogated to all the rights of the Assured under their bills of lading or transportation receipts or contracts, to the extent of such payments.

This insurance is warranted to be in all cases null and void to the extent of any insurance by any carrier or bailee which would attach and cover said property if this certificate had not been issued, and to be null and void, as concerns loss or damage by fire on land, to the extent of any insurance against loss or damage by fire directly or indirectly covering upon

the same property, whether prior or subsequent hereto in date or of the same date herewith, anything hereinbefore contained to the contrary notwithstanding; and it is also understood and agreed, that in case any agreement shall have been or shall be made or accepted by the Assured with any carrier or bailee by which it is stipulated or agreed that such or any carrier or bailee shall have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the Assurers shall be discharged of any liability for such loss hereunder, but these Assurers, in these and all cases of loss or damage by perils insured against, shall be liable and owe actual payment for only what cannot be collected from the carrier, bailee, and/or other insurers of property lost or damaged, but also shall be chargeable with the direct pecuniary consequence to the Assured temporarily arising from delay in collection from said carrier and/or bailee and/or insurers, and the advancing for this purpose only, of funds to the Assured for his protection pending such delay, shall in no case be considered as affecting the question of the final liability of these Assurers and as soon as collection is made from the carrier, bailee and/or insurers, the right of the Assured to hold the sums so advanced by these Assurers shall discontinue and a portion thereof equal to the sum collected from such carrier, bailee and/or insurers, shall be repaid to these Assurers, but in case of final failure to collect from such carrier, bailee and/or other insurers a portion of the sums advanced by

these Assurers, equal to the sum short collected from such carrier, bailee and/or other insurers, may be retained and applied in settlement of the actual liability of these Assurers thereby established, (provided always the loss shall constitute in other respects a claim under this insurance). In the event of loss or damage, this insurance shall be null and void in the extent of any payment made by any carrier, bailee, or other insurers whether liable or not.

Proofs of loss and all bills of expense must be approved by the Agent of these Assurers, if there be one at or near where the loss occurs, or the expenses are incurred, or if there be none in the vicinity, by the Correspondent of the National Board of Marine Underwriters, or by Lloyd's Agent; and such agent or correspondent must be represented on all surveys.

UNITED STATES OF AMERICA.

*In the United States District Court for the Western
District of Washington.*

IN EQUITY.

No. 186-E.

Subpoena.

The President of the United States of America, to H. G. Tremaine and S. L. Buckley, Doing Business Under the Firm Name and Style of Buckley-Tremaine Lumber Company, GREETING:

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United

States aforesaid, at the courtroom of said Court, in the city of Seattle, on the 13th day of April, 1920, to answer a bill of complaint filed against you in said court by American Merchant Marine Insurance Company of New York, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

WITNESS the Honorable JEREMIAH NETERER, Judge of said Court, and the seal thereof, at Seattle, Washington, this 24th day of March, 1920.

[Seal]

F. M. HARSHBERGER,
Clerk.

By Leeta D. Manning,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's Office of said Court, pursuant to said bill; otherwise the said bill will be taken, *pro confesso*.

[Seal]

F. M. HARSHBERGER,
Clerk.

By Leeta D. Manning,
Deputy Clerk. [6]

MARSHAL'S RETURN.

United States of America,
Western District of Washington,—ss.

I HEREBY CERTIFY, That I have served the within writ by delivering to and leaving a true copy

14 *American Merchant Marine Ins. Co. of N. Y.*

thereof with H. G. Tremaine, one of the partners of the firm.

JOHN M. BOYLE,
United States Marshal.
By Thos. Waters,
Deputy.

Mch. 24th, 1920.

Fees: \$2.12. [7]

No. 186.

Praeceptum for Appearance.

To the Clerk of the Above-entitled Court:

Please enter our appearance as solicitors for the defendant H. G. Tremaine. Service of all subsequent papers except writs and process may be made upon the undersigned as solicitors for said defendant at the address below given.

HUFFER & HAYDEN,
Solicitors for Defendant H. G. Tremaine.

Office and Postoffice Address: 527 Henry Building,
Seattle, Washington. [8]

No. 186.

Motion to Dismiss Bill of Complaint.

Comes now H. G. Tremaine, one of the defendants in the above-entitled action, and a copartner with F. L. Buckley, doing business under the firm name and style of Buckley-Tremaine Lumber & Timber Company (the bill of complaint herein incorrectly

designating the defendant F. L. Buckley as S. L. Buckley, and the firm name and style of Buckley-Tremaine Lumber & Timber Company now being incorrectly designated both in the bill of complaint and in the exhibits attached thereto as Buckley-Tremaine Lumber Company), and moves the Court to dismiss the bill of complaint herein upon the ground and for the reason that said bill of complaint shows upon its face by reference to Exhibit "A," that the said Exhibit "A" was preliminary to and an application for insurance as evidenced by the policy set forth as Exhibit "B"; that a copy of such application was not delivered with the policy to defendants and that the said application makes none of its statements or representations therein contained warranties, and the alleged phrase of said application sought by complainant to be incorporated in and made a warranty in said policy has no place in, and should not be inserted in said policy of insurance.

II.

That the said policy of insurance, marked Exhibit "B" and attached to the bill of complaint, does not by its terms make the said application, marked Exhibit "A," a part thereof, or contain any provision that any of the terms, phrases, or language used in the said application should become a warranty in the said policy or form a part thereof. [9]

III.

That the said application, marked Exhibit "A," was before the complainant prior to the writing of the said policy of insurance, and the bill of complaint fails to show that there was any mutual mistake, and

complainant herein is estopped from demanding the relief prayed for and attempting to modify said policy of insurance, after complainant delivered said policy to assured, and the same was accepted by the assured, without a copy of said application being attached thereto or any statement in said application being made a warranty either by said application or said policy.

IV.

That there is an insufficiency of fact to constitute a valid cause of action in equity against the defendant.

V.

That there is an adequate remedy at law.

HUFFER & HAYDEN,

Solicitors for Defendant H. G. Tremaine.

Service of the within motion to dismiss is hereby admitted this 13th day of April, 1920.

GROSSCUP & MORROW,

Attorney for Complainant. [10]

No. 186.

Hearing on Motion to Dismiss.

Now on this 26th day of April, 1920, this cause comes on for hearing on motion to dismiss, the plaintiff represented by Grosscup & Morrow and the defendants by Huffer & Hayden, whereupon the motion is treated as a demurrer and same is confessed. Amended complaint to be filed by April 29, 1920.

Equity Journal 1. [11]

No. 186.

Order Permitting Plaintiff to File Amended Bill of Complaint.

On this 26th day of April, 1920, upon motion made by Grosscup & Morrow, attorneys for the above-named plaintiff, for an order, before the hearing on defendants' motion to dismiss, for leave to file an amended bill, and it appearing to the Court a proper matter therefor, it is

ORDERED that plaintiff be and it is hereby permitted to file its amended bill of complaint and it is ordered to serve and file same by Thursday, April 29, 1920, and further hearing upon this cause is continued until Monday, May 3, 1920.

JEREMIAH NETERER,
Judge.

Approved:

GROSSCUP & MORROW.

HUFFER & HAYDEN,

For Deft. H. G. Tremaine. [12]

No. 186—IN EQUITY.

First Amended Bill of Complaint.

American Merchant Marine Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York and with its principal place of business in the City and County of New York, a citizen of the United States and a citizen and resident of the said

State of New York, alleges as its first amended complaint, filed herein by leave of Court first duly had and obtained, against H. G. Tremaine, a citizen of the State of Washington, and a resident of the Northern Division of the Western District thereof, and S. L. Buckley and John Doe Buckley, whose true name is to this plaintiff unknown, aliens, and subjects of the King of Great Britain and Ireland, and citizens and residents of the Provinces of British Columbia and Ontario, Dominion of Canada, respectively, as follows, that is to say :

I.

At all the times herein mentioned the plaintiff has been and it now is a corporation duly and regularly incorporated, organized and existing under and by virtue of the [13] laws of the State of New York, and at all of said times it was and it now is a citizen of the United States and a citizen and resident of the said State of New York with its principal business in the City of New York in said State of New York.

At all the times herein mentioned the plaintiff has been and it now is duly authorized to do business in the State of Washington by virtue of strict compliance with the laws of said State governing the right of foreign corporations to transact business therein.

At all the times herein mentioned the defendants H. G. Tremaine, S. L. Buckley and, as plaintiff is informed and believes, one John Doe Buckley, were and they now are copartners doing business under the firm name and style of Buckley-Tremaine Lumber Company, having a principal place of business in the

City of Seattle, State of Washington.

At all the times herein mentioned the defendant H. G. Tremaine was and he now is a citizen of the United States and a citizen and resident of the State of Washington, residing in the Northern Division of the Western District thereof.

At all the times herein mentioned the defendants S. L. Buckley and John Doe Buckley were and they now are aliens, subjects of the King of Great Britain and Ireland and citizens and residents of the Provinces of British Columbia and Ontario, Dominion of Canada, respectively.

II.

The grounds upon which the jurisdiction of this Court in this cause depend are that this is a suit of a civil nature in equity where the matter in controversy exceeds, exclusive of interests and costs, the sum or value of three thousand dollars (\$3,000.00), and is between a citizen of the State of [14] New York on the one hand and a citizen of the State of Washington and aliens, citizens or subjects of a foreign state on the other.

III.

On the 3d day of October, 1919, in the City of Seattle, State of Washington, the defendant made application in writing to the plaintiff for insurance in the sum of seven thousand eight hundred and seventy-five dollars (\$7,875.00) on certain lumber in which the defendant had an insurable interest, while on board S. L. B. Scow No. 3. in single tow of tug "Coutli" at and from Craig, Alaska, to Prince Rupert, B. C., and thence in double tow of approved

tug to Seattle, Washington, voyage actually to commence in October, 1919. Thereafter the plaintiff insured the said lumber in the sum of four thousand eight hundred and seventy-five (\$4,875.00) dollars for the voyage set forth in the said application, and as evidence of its acceptance of the said application and of the effecting of the insurance as aforesaid, the plaintiff endorsed in writing its acceptance of insurance in the said sum of four thousand eight hundred and seventy-five dollars (\$4,875.00) upon the said application. A copy of the application of the defendants with the acceptance of the plaintiff endorsed thereon (commonly called the cover note or cover slip) is hereunto annexed and made a part hereof and marked Exhibit "A."

IV.

At all times herein mentioned there has been and there now is a universal and long established custom and usage among underwriters of marine insurance and purchasers of such insurance that when insurance is sought by a purchaser, the latter prepares an application in writing setting forth the [15] nature of the risk, the amount of insurance desired, and any special terms, conditions and warranties upon which the risk is predicated, which said application is presented to the underwriter who rejects the same or accepts the risk in whole or in part, indicating his acceptance by endorsing on the said application over his signature the portion of the amount of insurance applied for which the said underwriter is willing to accept. As soon thereafter as the same can be prepared, the underwriter executes to the applicant a

formal policy or certificate of insurance embodying therein all the terms, conditions and warranties contained in the said cover note, which said policy or certificate when delivered to the assured supersedes and takes the place of said cover note. Such usage and custom was at all the times herein mentioned and now is known to the defendants and to each of them and the application of the 3d day of October, 1919, hereinabove in paragraph III hereof described, was presented by the defendants to the plaintiff and accepted by the plaintiff in accordance with the said custom and usage.

V.

On the 6th day of October, 1919, in accordance with the said custom and usage, the plaintiff executed and delivered to the defendants its certificate of insurance No. 11123-C, in the usual form, which said certificate of insurance contains all of the terms, conditions and warranties set forth in the said cover note, except as hereinafter alleged. A copy of the said certificate of insurance so executed is hereunto annexed, made a part hereof and marked Exhibit "B." The defendants thereupon accepted the said certificate of insurance in substitution of the said cover note in accordance with [16] the said custom and usage.

VI.

In drafting the said certificate, the scrivener employed by the plaintiff, by accident and mistake, failed to incorporate in the said certificate, the provision contained in the said cover note to the effect that the voyage of the scow from Craig, Alaska, to Prince

Rupert, B. C., should commence during the month of October, 1919. Thereupon the representative of the plaintiff in Seattle, Washington, without knowledge of the said omission, and believing that the said certificate of insurance did in fact contain all the provisions of the said cover note, by accident and mistake signed the said certificate and caused the same to be forwarded to the defendants.

VII.

As the plaintiff is informed and believes and therefore alleges, the defendants, also believing that the said certificate did in fact contain the said omitted provision, and did in fact contain all the provisions set forth in the said cover note, by accident and mistake accepted the said certificate of insurance in the form written in substitution of the said cover note, or the defendants, knowing that the said omitted provision was in fact not incorporated in the said certificate, and that the same was omitted therefrom by accident and mistake and without the knowledge of the plaintiff or of the plaintiff's representative, failed and neglected to disclose the fact of such omission to the plaintiff.

VIII.

Said omitted provision constituted a material express warranty by defendants materially and substantially affecting [17] the rights and obligations of plaintiff, and, by reason of the said omission by accident and mistake as aforesaid, the said certificate of insurance failed to express the contract of insurance between the plaintiff and the defendants, and in order to express such contract, the certificate

of insurance should be in words and figures identical with those set forth in a form hereunto annexed and made a part hereof, marked Exhibit "C."

IX.

The plaintiff has no plain, speedy and adequate remedy at law in the premises.

Forasmuch as plaintiff can have no relief, except in this court, the defendants, S. L. Buckley, H. G. Tremaine and John Doe Buckley, and each of them, may, according to their best belief, full, true, direct and perfect answer make to the matters hereinabove stated and charged; but not under oath, an answer under oath hereby being with respect to each of said defendants expressly waived.

AND the plaintiff humbly prays that on final hearing of this cause this Honorable Court may be pleased to grant to it, in the alternative, the following relief, that is to say:

1. That the defendants, and each of them, may be decreed to surrender to the clerk of this court for cancellation the original certificate of insurance of which Exhibit "B" is a copy, upon condition that the plaintiff shall simultaneously with the entry of the decree herein execute and deposit with said clerk for delivery to the defendants, a new certificate in lieu of the original which shall be in words and figures identical with the words and figures of Exhibit "C"; or, [18]

2. In the event that the defendants, or either of them, shall fail or refuse to obey such order or decree as may be entered pursuant to the first of these prayers, then that the defendants, and each of them, may

be enjoined and restrained from commencing in any court any action at law and/or suit in equity and/or admiralty designed or intended to enforce against plaintiff any liability arising out of or connected with the execution and delivery of plaintiff to defendants of said original certificate of insurance of which said Exhibit "B" is a copy, without first complying with the direction of such order or decree as may be entered pursuant to the first of these *prays*; or,

3. That plaintiff may have such other and further, or other or further, relief, orders and decrees as in equity and good conscience may seem meet to this Honorable Court.

B. S. GROSSCUP and
W. C. MORROW,
Solicitors for Plaintiff. [19]

Exhibit "A."

MATHER & CO.,
811 First Avenue,
Seattle, Wash.

Seattle, Wash., October 3d, 1919.

INSURANCE IS WANTED BY—BUCKLEY—
TREMINE LUMBER COMPANY.

LOSS, IF ANY, Payable to Them, or order.

FOR \$7,875. ON Lumber VALUED AT \$17.50 per
M. feet.

PER F. L. B. SCOW "No. 3" in single tow of TUG
"COUTLI," at and from Craig, Alaska to
Prince Rupert, B. C., thence while in double tow
of Approved Tug to Seattle, Wash., (Oct. Slg.)

RATE—3%.

This insurance is understood and agreed to be subject to English Law and usage as to Liability for and settlement of any and all claims.

CONDITIONS—Insured only against the risk of Total and/or Constructive Total Loss but to pay any General Average and/or Salvage Charges that may be incurred.

ACCEPTED—PACIFIC MARINE INSURANCE CO.

\$4875.00—AMERICAN MERCHANT MARINE INS. CO., of N. Y. [20]

Exhibit "B."

CERTIFICATE OF INSURANCE.

To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate it must be stamped within ten days after its receipt in the United Kingdom.

Special Cargo.	Amount
No. 11123-C	\$4875.00
	Rate 3%
	Prem. \$146.25

AMERICAN MERCHANT MARINE
INSURANCE COMPANY OF NEW YORK
SEELEY & CO., (MARINE) Inc.,

Pacific Coast General Agents

140 Sansome Street	Colman Bldg.
San Francisco, Cal.	Seattle, Wash.
Board of Trade Bldg.	Dominion Building
Portland, Ore.	Vancouver, B. C.

Seattle, Wash., October 6, 1919.

THIS IS TO CERTIFY, that on the sixth day of

October, 1919, this Company insured for Buckley-Tremaine Lumber Company, Four Thousand, Eight Hundred Seventy-five Dollars (\$4,875.00), on Lumber, original. Valued at \$17.50 per 1,000 feet, on board Scow F. L. B. No. 3 in tow tug "Coutli" and/or other approved tug at and from Craig, Alaska (in single tow) to Prince Rupert, B. C., thence (in double tow) to Seattle, Wash., loss, if any, payable to the order of the assured in Seattle.

This insurance subject to conditions as stated below and on back hereof.

[Stamped across face]: Copy. Not Negotiable. Original and Duplicate Issued. One of which Being Accomplished, the Other to Stand Null and Void.

MARKS AND NUMBERS.
CONDITIONS.

This certificate is subject to the full terms of the policy, BUT warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, or the consequence of any attempt thereat, whether lawful or unlawful, or whether by the act of any belligerent nations or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise, and whether occurring in a port of distress or otherwise, anything in this policy to the contrary notwithstanding, and free from all other consequences of hostilities whether before or after declaration of war.

Held covered at a premium to be arranged, in case of deviation or change of voyage or of any error or unintentional omission in the description of the in-

terest, vessel or voyage, provided same be communicated to the assurers as soon as known to the assured.

Held covered on board craft and/or lighter to and from the vessel. Each craft and/or lighter to be deemed a separate insurance.

IT IS AGREED THAT THERE SHALL BE NO RETURN OF PREMIUM IF INTEREST INSURED BE LOST BY PERILS NOT INSURED AGAINST HEREUNDER.

IN CASE OF LOSS APPLY TO Seeley & Co. (Marine), Inc., at Seattle, Wash.

CONDITIONS.

Warranted not to cover the interest of any alien enemies including such persons, copartnerships or corporations, as now, or may hereafter, appear in any Enemy Trading List issued by the War Trade Board of the United States of America.

ENGLISH POLICY.

Insured only against the risk of total and/or constructive total loss, but to pay any General Average and/or Salvage Charges that may be incurred.

This insurance is understood and agreed to be subject to English Law and usage as to Liability for and settlement of any and all claims.

IN WITNESS WHEREOF, the said Company has caused these Presents to be signed by its President and attested by its Secretary in the City of New York, but this certificate shall not be valid unless

countersigned by the Company's duly authorized representative.

I. STEWART,
President.

T. M. LEE MARTIN,
Secretary.

Countersigned at Seattle, Wash., the 6th day of October, 1919.

SEELEY & CO., (Marine), Inc.,
By M. D. CALDER,

Exhibit "C."

CERTIFICATE OF INSURANCE.

To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate it must be stamped within ten days after its receipt in the United Kingdom.

Special Cargo.	Amount
#11123-C	\$4,875.00
	Rate 3%
	Prem. \$146.25

**AMERICAN MERCHANT MARINE
INSURANCE COMPANY OF NEW YORK**

SEELEY & CO., (MARINE) Inc.,

Pacific Coast General Agents

140 Sansome Street

San Francisco, Cal.

Board of Trade Bldg.

Portland, Ore.

Colman Bldg.

Seattle, Wash.

Dominion Building

Vancouver, B. C.

Seattle, Wash., Oct. 6th, 1919.

THIS IS TO CERTIFY, that on the sixth day of October, 1919, this Company insured for Buckley-

Tremaine Lumber Company, Four Thousand, Eight Hundred Seventy-five and 00/100 Dollars, on Lumber. Original, valued at \$17.50 per 1,000 feet, on board Scow F. L. B. #3, in tow tug "Coutli" and/or other approved tug, at and from Craig, Alaska—October sailing (in single tow) to Prince Rupert, B. C., thence in double tow to Seattle, Wash., loss, if any, payable to the order of assured in Seattle.

This insurance subject to conditions as stated below and on back hereof.

[Stamped across face]: Copy. Not Negotiable. Original and Duplicate Issued. One of which Being Accomplished, the Other to Stand Null and Void.

MARKS AND NUMBERS.

CONDITIONS.

This certificate is subject to the full terms of the policy, BUT warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, or the consequence of any attempt thereat, whether lawful or unlawful, or whether by the act of any belligerent nations or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise, and whether occurring in a port of distress or otherwise, anything in this policy to the contrary notwithstanding, and free from all other consequences of hostilities whether before or after declaration of war.

Held covered at a premium to be arranged, in case of deviation or change of voyage or of any error or unintentional omission in the description of the interest, vessel or voyage, provided same be com-

municated to the assurers as soon as known to the assured.

Held covered on board craft and/or lighter to and from the vessel. Each craft and/or lighter to be deemed a separate insurance..

IT IS AGREED THAT THERE SHALL BE NO RETURN OF PREMIUM IF INTEREST INSURED BE LOST BY PERILS NOT INSURED AGAINST HEREUNDER.

IN CASE OF LOSS APPLY TO Seeley & Co. (Marine), Inc., at Seattle, Wash.

CONDITIONS.

Warranted not to cover the interest of any alien enemies including such persons, copartnerships or corporations, as now, or may hereafter, appear in any Enemy Trading List issued by the War Trade Board of the United States of America.

Insured only against the risk of total and/or constructive total loss, but to pay any General Average and/or Salvage Charges that may be incurred.

This insurance is understood and agreed to be subject to English Law and usage as to Liability for and settlement of any and all claims.

IN WITNESS WHEREOF, the said Company has caused these Presents to be signed by its President and attested by its Secretary in the City of New York, but this certificate shall not be valid unless countersigned by the Company's duly authorized representative.

I. STEWART,
President.

T. M. LEE MARTIN,
Secretary.

Countersigned at Seattle, Wash., the 6th day of October, 1919.

SEELEY & CO., (Marine), Inc.,

By _____.

Rec'd copy of foregoing First Amended Complaint by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of Court, this 28th day of April, 1920.

HUFFER & HAYDEN,

Attorney for H. G. Tremaine, Defendant, [21]

IN EQUITY—No. 186.

Motion to Dismiss First Amended Bill of Complaint.

Comes now, H. G. Tremaine, one of the defendants in the above-entitled and numbered action, and a co-partner with F. L. Buckley, doing business under the firm name and style of Buckley-Tremaine Lumber & Timber Company (the first amended complaint herein incorrectly designating the defendant, F. L. Buckley as S. L. Buckley, and the firm name and style of Buckley-Tremaine Lumber & Timber Company as Buckley-Tremaine Lumber Company, both in the bill of complaint and the exhibits attached thereto), and moves the Court to dismiss the first amended complaint herein upon the ground and for the reason that said bill of complaint shows upon its face, by reference to Exhibit "A" that the said Exhibit "A" was preliminary to and an application for insurance as evidenced by the policy set forth as Exhibit "B";

that a copy of such application was not delivered with the policy to defendants, and that the said application makes none of its statements or representations therein contained warranties, and the alleged phrase of said application sought by complainant to be incorporated in and made a warranty in said policy has no place in, and should not be inserted in said policy of insurance.

II.

That the said policy of insurance, marked Exhibit "B" and attached to the said bill of complaint, does not by its terms make the said application, marked Exhibit "A," a part thereof, or contain any provision that any of the terms, phrases, or language used in the said application should become a warranty in the said policy or form a part thereof.

III.

That the said application, marked Exhibit "A," was before the complainant prior to the writing of the said policy of insurance, [22] and the said bill of complaint fails to show that there was any mutual mistake, and complainant herein is estopped from demanding the relief prayed for and attempting to modify said policy of insurance after complainant delivered said policy to assured and the same was accepted by the assured, without a copy of said application being attached thereto or any statement in said application being made a warranty either by said application or said policy.

IV.

That there is an insufficiency of fact to constitute a valid cause of action in equity against defendant.

V.

That there is an adequate remedy at law.

VI.

That said first amended complaint shows upon its face that complainant's alleged cause of action is based wholly upon a usage and custom which is contrary to statutory law and fatal to the relief prayed for; that said usage and custom is so pleaded that, being incompetent, irrelevant and immaterial, it cannot be stricken from said bill of complaint without destroying the whole thereof.

VII.

That said first amended complaint shows upon its face that it is a different cause of action against different parties defendant than those named in the original bill of complaint, the defendant H. G. Tremaine appearing specially for the purpose of objecting to the jurisdiction of the Court herein to require him to plead or answer to said first amended complaint without service of process thereunder.

HUFFER & HAYDEN,

Solicitors for Defendant, H. G. Tremaine. [23]

Due service of the within motion to dismiss is hereby admitted this 30th day of April, 1920.

GROSSCUP & MORROW,

Attorneys for Pltf. [24]

No. 186

**Hearing on Motion for Order Dismissing First
Amended Bill of Complaint.**

Now on this 3d day of May, 1920, this cause comes

on for hearing in open court on Motion for Order Dismissing First Amended Complaint, Grosscup & Morrow appearing for Plaintiff and Huffer & Hayden for the Defendants, whereupon the motion is argued by respective counsel and taken under advisement by the court.

Equity Journal 1. [25]

No. 186—E.

Decision.

Filed May 6, 1920.

Messrs. GROSSCUP & MORROW, Solicitors for Plaintiff.

Messrs. HUFFER & HAYDEN, Solicitors for Defendants.

NETERER, District Judge.

The plaintiff seeks to correct certificate of insurance issued to the defendant "Per Lumber on F. L. B. Scow No. 3," in single tow of Tug "Coutli" at and from Craig, Alaska, to Prince Rupert, B. C., thence while in double tow of approved tug to Seattle, Washington, by inserting in the certificate of insurance: "October Sailing." It is alleged that by inadvertence and mistake, the certificate was issued without including these words which were endorsed upon the application for insurance. The application for insurance is not signed by the insured. It is dated October 3, 1919. The certificate of insurance was issued October 6, 1919. The defendants have moved to dismiss upon the ground that the petition does not state facts upon which to predicate any relief.

It does not appear from the complaint that the

application is made a part of the certificate, or the basis for its insurance; nor does the language of the certificate comprehend or have relation to the amendment sought. The application for insurance was made in Seattle, and the certificate was issued in Seattle. The contract is made pursuant to the laws of Washington, although there is endorsed upon the certificate that as to liability for and settlement of any and all claims, it should be subject to English law and usage; but no English law and usage is pleaded; nor is this a proceeding in settlement of any claim in the policy. The Insurance Code of Washington, Sec. 5069-31, L. 11, p. 195, Sec. 31, provides that:

“Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon, such application shall become a part of the insurance contract, and failing so to do, it shall not be made a part of the insurance contract.”

The statute must be complied with, or the application cannot be considered. *Joyce on Insurance*, Sec. 190, and cases cited. Section 6059--179 has no application. The motion is sustained.

JEREMIAH NETERER,

Judge. [26]

Cases cited by Plaintiff:

6059-179 Equity Insurance Co. v. Hern, 20
Wall. 494.

Kilbourn v. Sunderland, 130 U. S. 505.

Taylor v. Merchants Ins. Co., 9 Howard 191.

Western Assur. Co. v. Ward, 75 Fed. 338.

26 Cyc. p. 569, Sec. 3, Subdiv. 2.

p. 613, Sec. 6, Subdiv. d.

Joyce on Ins., Vol. 5, Sec. 309.

Cases cited by defendants:

Minor, Conflict of Laws, p. 411, Sec. 172.

R. & B. Code, Sec. 6059-31.

1 Joyce, Ins. 481, Sec. 186.

498, Sec. 190.

501, Sec. 190-b.

502, Sec. 190-c.

503, Sec. 190-e.

513, Sec. 190-t.

522, Sec. 194.

530, Sec. 194.

637, Sec. 247.

640-1, Sec. 249.

258, Sec. 66.

154, Sec. 31. [27]

IN EQUITY—No. 186.

Judgment of Dismissal.

This cause came on to be heard on this day upon motion of the defendant H. G. Tremaine to dismiss the first amended complaint in equity of the plaintiff

with prejudice, and the plaintiff declining to further plead, the motion is granted.

It is therefore hereby ORDERED, ADJUDGED AND DECREED that the first amended complaint in equity be, and the same is hereby dismissed as to Tremaine with prejudice, upon the ground that it does not state a cause for equitable relief; and that the said defendant do have and recover his costs and disbursements herein to be taxed; to which the plaintiff excepts, and exception is noted.

Done in open court this 17th day of May, 1920.

JEREMIAH NETERER,

Judge. [28]

IN EQUITY—No. 186

Assignment of Errors.

And now on the 18th day of May, A. D. 1920, comes the plaintiff herein, American Merchant Marine Insurance Company of New York, by B. S. Grosscup, W. Carr Morrow, Harold M. Sawyer and Alfred T. Cluff, its solicitors, and says that the decree in said cause is erroneous and against the just rights of plaintiff, for the following reasons, that is to say:

FIRST. Because the District Court of the United States for the Western District of Washington, Northern Division, erred in ordering and directing the dismissal of plaintiff's suit and in holding that plaintiff was not entitled to the relief prayed for in its bill of complaint and in holding that the first amended complaint herein did not state facts suffi-

cient to entitle plaintiff to equitable relief, or any relief, and the District Court erred in rendering judgment for the defendant, H. G. Tremaine, [29] in said cause, because said first amended complaint does state facts sufficient to entitle plaintiff to equitable relief in that it appears from said first amended complaint herein that prior to the issuance and delivery by plaintiff to defendants of the certificate of insurance embodied in Exhibit "B" and attached to and made a part of said first amended complaint, there existed between plaintiff and defendants a valid and mutually enforceable contract embodied in Exhibit "A" and attached to and made a part of said first amended complaint, all the terms and provisions of which were in accordance with the custom set forth in said first amended complaint intended by the plaintiff and defendants to be incorporated in said Exhibit "B," and that by reason of the mutual mistake of plaintiff and defendants, there was omitted from said Exhibit "B" when the same was delivered pursuant to said custom by plaintiff to defendants, a material term, condition and warranty contained in said existing contract in which omission defendants knowingly and fraudulently acquiesced.

SECOND. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated Code of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance with said Section, for the reason that said Section has no application to the facts alleged in said

first amended complaint and does not apply to contracts of marine insurance.

THIRD. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated [30] Code of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance with said section, for the reason that said section merely prescribes a rule of evidence for determining the construction of an insurance policy in an action brought by the assured to recover thereon.

FOURTH. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated Code of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance with said section, for the reason that said section is merely a statutory extension of the parol evidence rule.

FIFTH. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated Code of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance with said section, for the reason that said section does not preclude examination of the antecedent contract set forth in the said first amended complaint for the purpose of determining in a court of equity whether or not a subsequent formal certificate of marine insurance issued pursuant to said custom and in which it was intended by the parties hereto that said antecedent contract should be merged shall be

reformed so as to express accurately all of the terms, condition and warranties of said antecedent contract.

SIXTH. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated Code [31] of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance with said section, for the reason that said section applies only to a case where the application for insurance is not accepted unless and until there is a delivery of a policy, and has no application to a case where the application has been accepted and there is an existing and mutually enforceable contract between the parties prior to and independently of the subsequent delivery of any certificate of insurance.

SEVENTH. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated Code of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance with said Section, for the reason that said section does not apply to a case where the antecedent contract is embodied *verbatim* in the certificate of insurance with the exception of material portions of said antecedent contract omitted by reason of mutual mistake and fraudulent acquiescence therein.

EIGHTH. The District Court erred in holding that Section 6059--31 of Remington & Ballinger's Annotated Code of the State of Washington (Laws of 1911, Chap. 49, Sec. 31, Pg. 195) precluded the plaintiff from obtaining any relief without compliance

with said section, for the reason that said section cannot control the practice or prescribe rules of evidence in or for the governance of the equity courts of the United States of America.

WHEREFORE said plaintiff prays that said decree be reversed and that the District Court be directed [32] by the Circuit Court of Appeals for the Ninth Circuit to enter a decree denying the motion of said defendant, H. G. Tremaine, to dismiss said first amended complaint.

B. S. GROSSCUP,
W. CARR MORROW,
HAROLD M. SAWYER,
ALFRED T. CLUFF,

Solicitors for Plaintiff.

Service of the within and foregoing assignment of errors by the receipt of a true copy thereof hereby is admitted in behalf of all parties entitled to such service by law or by rules of court this 18th day of May, 1920.

HUFFER & HAYDEN,
Attorneys for Deft. H. G. Tremaine. [33]

IN EQUITY—No. 186.

**Petition for Appeal to the United States Circuit
Court of Appeals for the Ninth Circuit.**

The above-named plaintiff, American Merchant Marine Insurance Co. of New York, conceiving itself aggrieved by the Decree made and entered on the 17th day of May, 1920, in the above-entitled cause, does hereby appeal from said decree to the United

States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and it prays that this appeal may be allowed, that citation be issued as provided by law, and that a transcript of record, proceedings and papers, upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And said plaintiff further prays that the proper order touching the security required of it to perfect its appeal be made, and, desiring to supersede the execution of the decree, said plaintiff here tenders bond with sufficient surety in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

B. S. GROSSCUP,
W. CARR MORROW,
HAROLD M. SAWYER,
ALFRED T. CLUFF,
Solicitors for Plaintiff. [34]

Service of the within and foregoing Petition for Appeal by the receipt of a true copy thereof, hereby is admitted in behalf of all parties entitled to such service by law or rules of court, this 18th day of May, 1920.

HUFFER & HAYDEN,
Attorneys for Deft. H. G. Tremaine. [35]

IN EQUITY—No. 186.

**Order Allowing Appeal and Fixing Cost and
Supersedeas Bond.**

There having been presented to the Court the petition of appeal of American Merchant Marine Insurance Co. of New York, plaintiff herein, from the Decree made and entered in this court on the 17th day of May, 1920, and said plaintiff having petitioned that a supersedeas may issue suspending the execution of said decree pending said appeal;

It is here and now ORDERED AND ADJUDGED that said petition of appeal be and it hereby is allowed.

It is further ordered that the bond with sufficient sureties for cost and supersedeas be, and the same is, hereby fixed in the sum of fifty-five hundred dollars, to be conditioned as required by law.

Done in open court this 18th day of May, 1920.

JEREMIAH NETERER,

Judge.

Service of the within and foregoing order by the receipt of a true copy thereof hereby is admitted in behalf of deft. H. G. Tremaine, this 18th day of May, 1920.

HUFFER & HAYDEN,

Attys. for Deft. H. G. Tremaine. [36]

No. 186—IN EQUITY.

Supersedeas and Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, American Merchant Marine Insurance

Company of New York, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto H. G. Tremaine in the full and just sum of five thousand five hundred dollars (\$5,500), to be paid to the said H. G. Tremaine, his heirs, executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

IN TESTIMONY WHEREOF, American Merchant Marine Insurance Company of New York has caused this instrument to be executed on its behalf and in its name by C. H. Williamson, its General Agent, and American Surety Company of New York has likewise caused this instrument to be executed on its behalf and in its name by S. H. Melrose, its resident vice-president, its corporate seal to be hereon set and the same to be attested by C. N. Bertch, [37] its resident Assistant Secretary, all on this 29th day of May, in the year of our Lord, one thousand nine hundred and twenty.

WHEREAS, lately at a District Court of the United States, for the Western District of Washington, Northern Division, in a suit pending in said Court between American Merchant Marine Insurance Company of New York, as plaintiff, and H. G. Tremaine, S. L. Buckley and John Doe Buckley, doing business under the firm name and style of Buckley-Tremaine Lumber Company, as defendants, a decree was rendered against said American Merchant Marine Insurance Company of New York, and said American Merchant Marine Company of New

York having obtained an allowance of an appeal and filed a copy thereof in the clerk's office of the said Court to reverse the decree in aforesaid suit, and a citation directed to the said H. G. Tremaine citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, on the 16th day of June, 1920, and within thirty days from and after the date of said citation.

NOW, the condition of the above obligation is such, that if the said American Merchant Marine Insurance Company of New York shall prosecute its said appeal to effect, and answer all damages and costs if it fails to make its plea [38] good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN MERCHANT MARINE INSURANCE COMPANY OF NEW YORK.

By (Signed) CHAS. H. WILLIAMSON,
General Agent.

AMERICAN SURETY COMPANY OF NEW YORK.

By S. H. MELROSE,
Resident Vice-President.

[Seal]

Attest: C. N. BERTCH,
Resident Asst. Secretary.

Approved this 1st day of June, 1920.

JEREMIAH NETERER,
District Judge.

Received copy of the within this 1st day of June,
1920.

HUFFER & HAYDEN,
Attorneys for Defendant Tremaine. [38a]

No. 186—IN EQUITY.

**Stipulation Re Motion to Strike Defendant's
Praecipe for Additional Record.**

IT IS STIPULATED AND AGREED by and between counsel for the respective parties undersigned that the transcript on appeal may show that the plaintiff moved to strike the defendant H. G. Tremaine's praecipe for additional record, on the ground and for the reason that the additional papers and journal entries requested in said praecipe were immaterial to the issue and unnecessary for the determination of said case on appeal; that said motion was heard by the Court on June 7, 1920, and an order entered denying said motion.

This stipulation to be included in the transcript on appeal in lieu of said motion and journal entries denying the same.

Dated June 7, 1920.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
B. S. GROSSCUP,
W. C. MORROW,

Solicitors for Plaintiff.

HUFFER & HAYDEN,
Solicitors for Defendant.

Filed June 7, 1920.

No. 186.

Hearing on Motion to Strike Praecipe for Additional Record.

Now, on this 7th day of June, 1920, this cause comes on for hearing in open court on motion to strike praecipe for additional record, and after argument by respective counsel, the motion is denied by the Court and exception allowed.

Journal 8. [40]

IN EQUITY—No. 186.

Praecipe for Transcript of Record.

To the Clerk of the Above-Entitled Court:

You are requested to take a transcript of the record and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, omitting all captions and endorsements, verifications, etc., but containing all proofs of service, and to include in such transcript of record the following and no other papers, that is to say:

1. First amended complaint.
2. Motion of defendant, H. G. Tremaine, to dismiss first amended complaint.
3. Opinion of Court sustaining said motion.
4. Decree dismissing said first amended complaint.
5. Assignment of errors.
6. Petition for appeal.
7. Order allowing appeal and fixing amount of cost of supersedeas bond.
8. Cost and supersedeas bond.

9. Citation and proof of service.
10. Praeceptum and proof of service.
11. Your certificate.
12. Stipulation re motion to strike defendant's praecipe.
13. Order denying said motion.

B. S. GROSSCUP,
W. CARR MORROW,
HAROLD M. SAWYER,
ALFRED T. CLUFF,
Solicitors for Plaintiff. [41]

I waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

HAROLD M. SAWYER,
Of Solicitors for Plaintiff.
HUFFER & HAYDEN,
Attys. for Deft. Tremaine.

Service of the within and foregoing praecipe by the receipt of a true copy thereof hereby is admitted in behalf of H. G. Tremaine, this 18th day of May, 1920.

HUFFER & HAYDEN,
Attys. for Deft. H. G. Tremaine. [42]

No. 186.

Praecipe for Additional Record.

To the Clerk of the Above-entitled Court:

You are requested to include the following additional papers and journal entries in the transcript

of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, omitting captions, endorsements and verifications, but containing all proofs of service:

1. Original bill of complaint.
2. Subpoena.
3. Marshal's return on subpoena.
4. Appearance of defendant H. G. Tremaine.
5. Motion to dismiss of defendant H. G. Tremaine.
6. Journal entry of April 26th, showing above motion treated as demurrer—Confessed. Amended complaint to be filed by April 29th, 1920.
7. Order granting leave to file amended complaint.
8. Journal entry of May 3d showing hearing on motion to dismiss first amended complaint; advisement.

HUFFER & HAYDEN,

Solicitors for Defendant H. G. Tremaine. [43]

*United States District Court, Western District of
Washington, Northern Division.*

No. 186—E.

AMERICAN MERCHANT MARINE INSUR-
ANCE CO., OF NEW YORK, a Corporation,
Plaintiff,

vs.

H. G. TREMAINE, S. L. BUCKLEY and JOHN
DOE BUCKLEY, Doing Business Under the
Firm Name and Style of BUCKLEY-TRE-
MAINE LUMBER CO.,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 43, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipes of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [44]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant and appellee for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

FOR APPELLANT:

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return, 68 folios at 15¢.....	\$10.20
Certificate of clerk to transcript of record 4 folios at 15¢....	.60
Seal to said certificate.....	.20

FOR APPELLEE:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 27 folios at 15¢.....	\$ 4.05
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I hereby certify that the above costs for preparing and certifying record for appellant amounting to \$11.00 and for appellee amounting to \$4.05, have been paid to me by solicitors for appellant and appellee, respectively.

I further certify that I hereby attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 12th day of June, 1920.

[Seal]

F. M. HARSHBERGER,
Clerk United States District Court. [45]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

IN EQUITY—No. 186.

AMERICAN MERCHANT MARINE INSUR-
ANCE CO. OF NEW YORK, a Corporation,
Plaintiff,

vs.

H. G. TREMAINE, S. L. BUCKLEY and JOHN
DOE BUCKLEY, Doing Business Under the
Firm Name and Style of BUCKLEY-TRE-
MAINE LUMBER CO.,

Defendants.

Citation and Notice on Appeal.

To H. G. Tremaine, S. L. Buckley and John Doe
Buckley, and to F. A. Huffer and W. H. Hay-
den, Solicitors for H. G. Tremaine, GREET-
ING:

YOU ARE HEREBY NOTIFIED that in a cer-
tain cause in equity in the District Court of the
United States for the Western District of Washing-
ton, Northern Division, wherein American Merchant
Marine Insurance Co. of New York is plaintiff, and
H. G. Tremaine, S. L. Buckley and John Doe Buck-
ley, doing business under the firm name and style of
Buckley-Tremaine Lumber Co., are defendants, an
appeal has been allowed the plaintiff therein to the
United States Circuit Court of Appeals for the Ninth
Circuit.

You are hereby cited and admonished to be and
appear in said court at the city of San Francisco,

State of California, on the 16th day of June next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Seattle, in the Ninth Circuit, this 18th day of May, in the year of our Lord one thousand nine hundred and twenty.

[Seal]

JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington, Northern Division. [46]

[Endorsed]: No. 186. In the United States District Court, Western District of Washington, Northern Division. American Merchant Marine Insurance Company of New York, a Corporation, Plaintiff, vs. H. G. Tremaine, S. L. Buckley and John Doe Buckley, Doing Business Under the Firm Name and Style of Buckley-Tremaine Lumber Company, Defendants. Citation. Filed in the United States District Court, Western District of Washington, Northern Division. May 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Service of the within and foregoing Citation and Notice by the receipt of a true copy thereof hereby is admitted in behalf of defendant H. G. Tremaine, this 18th day of May, 1920.

HUFFER & HAYDEN,

Attorneys for Deft. H. G. Tremaine. [47]

[Endorsed]: No. 3513. United States Circuit Court of Appeals for the Ninth Circuit. American Merchant Marine Insurance Company of New York, a Corporation, Appellant, vs. H. G. Tremaine, S. L.

Buckley and John Doe Buckley, Doing Business Under the Firm Name and Style of Buckley-Tremaine Lumber Company, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 15, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.